Supreme Court of the United States

OCTOBER TERM, 1962

No. 783

UNITED STATES, APPELLANT

vs.

DAVID THOMAS HEALY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

INDEX

[fol. a]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION

THE UNITED STATES

vs.

DAVID THOMAS HEALY (23) and
LEONARD MALCOLM OETH

Violation; Kidnapping & Aircraft Piracy
18 1201
49 1472(i)

Attorneys

For U. S.:

EDMOND GONG

For Defendant:

ALVIN GOODMAN for Deft. HEALY
Seybold Building
Miami, Florida

(201) (1090)

Statistical Record	Costs
J.S. 2 mailed	Clerk
J.S. 3 mailed	Marshal
Violation	Docket fee
Title	
Sec.	
JS 2	
X Card	

DOCKET ENTRIES

Date	
1962	
June 6	Indictment filed
June 15	Order for Warrant of Arrest issued as to David Thomas Healy. Bond set at $25,000.00

Date 1962		
June 15	Order for Warrant of Arrest issued as to Leonard Malcolm Oeth. Bond set at $25,000.00	
Sept. 7	ARRAIGNMENT: HEALY Plea of Not Guilty. 10 days for motions.	
Sept. 7	Oral Motion For Reduction of Bond—Granted Bond reduced to $10,000.00.—Formal Order to enter.	
Sept. 7	Count 2 Dismissed—Formal Order to enter.	
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[Clerk's Certificate to foregoing paper omitted in printing.]

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION

No. 287-62-M-Cr.

18 U.S.C. § 1201 (life)
49 U.S.C. § 1472(i)
M/S Death—NLT 20 yrs.

UNITED STATES OF AMERICA

vs.

DAVID THOMAS HEALY, also known as Harrold Moore, and LEONARD MALCOLM OETH, also known as James A. Eastham

INDICTMENT—filed June 6, 1962

The Grand Jury charges:

COUNT ONE

That on or about April 13, 1962, in the Southern District of Florida,

DAVID THOMAS HEALY, also known as Harrold Moore, and

LEONARD MALCOLM OETH, also known as James A. Eastham

did knowingly and unlawfully kidnap, transport and cause to be transported in foreign commerce from Dade County, Florida, in the United States of America, to the Republic of Cuba, a person, to-wit: Woodruff Mead, by forcing him at gunpoint and against his will to fly an airborne aircraft which he was then piloting, to-wit: a four-passenger Cessna 172, Serial Number 28368, Federal Aviation Agency License N5768A, to the Republic of Cuba, which said kidnapping and transportation was done for the purpose of transporting the said defendants from Dade County, Florida, in the United States of America, to the Republic of Cuba which was accomplished, and after which Woodruff Mead was liberated unharmed from the unlawful custody and control of the said defendants; in violation of Title 18, United States Code, Section 1201.

[fol. 2] COUNT TWO

That on or about April 13, 1962, in the Southern District of Florida,

DAVID THOMAS HEALY, also known as Harrold Moore, and

LEONARD MALCOLM OETH, also known as James A. Eastham

did commit aircraft piracy in that the said defendants, while passengers therein, did, with wrongful intent, seize an aircraft in flight in air commerce by threat of force and violence and did, with wrongful intent, exercise control of an aircraft in flight in air commerce by threat of force and violence, that is, the said defendants did unlawfully force a pilot, Woodruff Mead, at gunpoint and against his will, to fly an airborne aircraft, to-wit: a four-passenger Cessna 172, Serial Number 28368, Federal Avaiation Agency License N5768A, from Dade County, Florida, in the United States of America, to the Republic of Cuba, which said aircraft Woodruff Mead was piloting and operating within the limits of a Federal airway at the time it was unlawfully seized by the said defendants and at times thereafter, while under the unlawful control of the said defendants imposed through threat of force and violence, and which said aircraft Woodruff Mead was, at all times pertinent, piloting and operating so as to directly affect safety in interstate, overseas and foreign air commerce, while under the unlawful control of the said defendants imposed through threat of force and violence; all in violation of Title 49, United States Code, Section 1472(i).

A TRUE BILL,

/s/ Harry P. Cain
FOREMAN

EDWARD F. BOARDMAN
UNITED STATES ATTORNEY

By: /s/ Edmond J. Gong
Assistant United States Attorney

[fol. 3] Form No. 195

No. .....

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

THE UNITED STATES OF AMERICA

vs.

DAVID THOMAS HEALY, also known as Harrold Moore, and LEONARD MALCOLM OETH a/k/a James A. Eastham

INDICTMENT

Vio: 18 USC 1201
49 USC 1472(i)

A true bill,

/s/ Harry P. Cain
Foreman.

Filed in open court this 6th day of June, A.D. 1962.
JULIAN A. BLAKE, CLERK

By: /s/ Russell A. Fredrickson
Deputy Clerk.

Bail, $.....

GPO 935863

[fol. 3a]

LET WARRANT FOR ARREST ISSUE AS TO
David Thomas Healy, aka Harrold Moore
BOND SET IN THE AMOUNT OF $25,000.00

LET WARRANT FOR ARREST ISSUE AS TO
Leonard Malcolm Oeth aka James A. Eastham
BOND SET IN THE AMOUNT OF $25,000.00

DATED AT MIAMI, FLORIDA, THIS 14 DAY OF JUNE, 1962

/s/ David W. Dyer
UNITED STATES DISTRICT JUDGE

[fol. 4]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION

No. 287-62 CR

[Title Omitted]

[File Endorsement Omitted]

MOTION TO DISMISS—filed September 10, 1962

COME NOW the Defendants by and through their undersigned attorneys, and do hereby move to dismiss the indictment filed herein as to Count One in accordance with Rule 12 of the Federal Rules of Criminal Procedure Title 18 USCA, on the grounds that said indictment fails to charge an offense against the United States of America, in that said indictment Count One does not state sufficient facts to constitute an offense against the United States of America, and further that the evidence before the Grand Jury upon which this indictment is framed was insufficient and incompetent.

Dated at Miami, Dade County, Florida, this 10th day of September, 1962.

SHEVIN, GOODMAN & HOLTZMAN
Attorneys for Defendants
346 Seybold Building
Miami 32, Florida.

By /s/ Alvin Goodman

[fol. 5]

[Certificate of Service omitted in printing]

[fol. 6]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION

No. 287-62-M-Cr-EC

[File Endorsement Omitted]

UNITED STATES OF AMERICA

vs.

DAVID THOMAS HEALY, also known as Harrold Moore, and LEONARD MALCOLM OETH, also known as James A. Eastham

ORDER DISMISSING INDICTMENT—September 17, 1962

THIS CAUSE having come on upon Motion to Dismiss the Indictment filed on behalf of the defendant, David Thomas Healy, and the Court having heard argument of counsel and being fully advised in the premises, it is, thereupon,

ORDERED AND ADJUDGED:

1. That Count One of the Indictment be, and the same is, hereby dismissed, the Court being of the opinion that such count does not state an offense under Title 18, United States Code, Section 1201, in that it fails to allege that Woodruff Mead was kidnapped and held "for ransom or reward or otherwise", the Court construing the word "otherwise" as contained in the Statute to mean some like wrongful goal of the type such as ransom or reward, that is, of some pecuniary profit to the defendants.

2. That Count Two of the Indictment be, and the same is, hereby dismissed, the Court being of the opinion that the aircraft alleged to have been pirated is not "an aircraft in flight in air commerce" as defined in Title 49, United States Code, Section 1472(i), the Court construing the quoted language of the Statute as being applica-

ble only to commercial airliners engaged in the carriage of goods and persons for hire.

3. That the outstanding warrant for the arrest of Leonard Malcolm Oeth upon this Indictment be, and the same is, hereby canceled.

DONE AND ORDERED at Miami, Florida, this 17th day of September, 1962.

/s/ Emett C. Choate
UNITED STATES DISTRICT JUDGE

cc. U. S. Attorney (Gong)
U. S. Marshal (2)
Alvin Goodman, Esquire

[fol. 7]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION

No. 287-62-M-Cr.-EC

[Title Omitted]

[File Endorsement Omitted]

PETITION FOR REHEARING—filed October 17, 1962

The United States of America, by and through its undersigned United States Attorney, petitions this Honorable Court for a rehearing of the Motion to Dismiss both counts of the Indictment filed herein on behalf of the defendants, and further moves this Court to vacate its Order dismissing Counts I and II of the Indictment entered herein on September 17, 1962 and filed herein September 19, 1962; and as grounds therefor the United States of America states as follows:

(1) That this Court's Order dismissing Count I of the Indictment recites that the Court construes the word "otherwise" as contained in Title 18, United States Code, Section 1201 (the Kidnapping Statute) to mean some like wrongful goal of the type such as ransom or reward that is of some pecuniary profit to the defendants. Such a construction of the statute is contrary to that found in the decided case of *Gooch* v. *United States* (1936), 297 U.S. 124, in which the Supreme Court held that holding to prevent the captor's arrest was within former section 408a of this title punishing holding for "reward or otherwise" since if the word reward as commonly understood is not broad enough to include benefits expected to follow prevention of arrest, such benefits fall within the broad term "otherwise". In *Sanford* v. *United States*, 169 F.2d 71, the court stated the offense was complete under [fol. 8] former section 408a of this title without any other or additional "holding" of victim that the "holding" which was implicit in the kidnapping and interstate

transportation of the victim for purpose of robbing him. In *United States* v. *Parker*, 103 F.2d 857, the court stated that under former section 408a of this title specifically penalizing transportation in interstate commerce, a person kidnapped and held for "ransom or reward or otherwise" Congress by phrase "or otherwise" intended to include any object of a kidnapping which the perpetrator might consider of sufficient benefit to himself to induce him to undertake it, and did not intend to restrict the act to cases involving pecuniary benefit to kidnappers, and in *Brooks* v. *United States*, 199 F.2d 336, the court held that the argument that the abduction and transportation of persons flogged was not for ransom or reward or other benefits to the abductors, did not preclude conviction of violation of this section.

In *Brooks* v. *United States, supra*, the court stated that the kidnapping statute as passed in 1932 required that the transported person be held for "ransom or reward." In the amendment of 1934 Congress enlarged the purpose and coverage of the act by inserting the words "or otherwise, except, in the case of a minor, by a parent thereof." The purpose of the amendment was set forth in the report of the Senate Judiciary Committee (Senate Report No. 534, 73rd Congress 2d Session):

> "The object of the addition of the word 'otherwise' is to extend the jurisdiction of this act to persons who have been kidnapped and held, not only for reward but for any other reason."

In the *Brooks* case the court noted that lower federal courts have held that interstate transportation of a kidnapped person for the following purposes is punishable under the act: (1) The extortion of a confession to en- [fol. 9] hance the reputation of the kidnapper as a detective. (2) Securing the services of a kidnapped person by the kidnappers. (3) Robbery and the prevention of reporting of the crime. (4) Securing transportation in the victim's automobile. (5) The transportation of the kidnapper to aid his escape from penal confinement. (6) The placing of the victim in a house of prostitution. (7) The rape of the victim. The cases so holding the above are cited at page 337 in the *Brooks* opinion.

The Government may not have specifically called these cases to the attention of the Court at the time of the original hearing on the Motion to Dismiss.

(2) That the Court's Order dismissing Count II of the Indictment recites that the Court construes the language "an aircraft in flight in air commerce" as defined in Title 49, United States Code, Section 1472(i), as being applicable only to commercial airliners engaged in the carriage of goods and persons for hire. The Government would urge upon the Court, on rehearing, the definition of "air commerce" contained in Title 49, United States Code, Section 1301, which encompasses the operation of any aircraft in any Federal airway or where it may endanger safety in interstate and foreign commerce, and the legislative history of the Act contained in House Report No. 958, indicating that the term "air commerce" was used designedly because of its broad scope.

WHEREFORE, the United States of America petitions this Court to enter its order granting it a rehearing of the defendants' Motion to Dismiss and moves this Honorable Court to vacate its Order of September 17, 1962 dismissing Counts I and II of the Indictment and to enter [fol. 10] an order denying said Motion to Dismiss as to both counts.

Dated this 3rd day of October, 1962.

EDWARD F. BOARDMAN
UNITED STATES ATTORNEY

By /s/ Edmond J. Gong
Assistant United
States Attorney

[Certificate of Service omitted in printing]

[fol. 11]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION

No. 287-62-M-Cr.EC

[Title Omitted]

[File Endorsement Omitted]

ORDER DENYING PETITION FOR REHEARING—November 5, 1962

THIS CAUSE came on to be heard upon the motion of the plaintiff, United States of America, on Petition for Rehearing, and the Court having heard argument of counsel and being fully advised in the premises, it is, thereupon,

ORDERED AND ADJUDGED that plaintiff's Petition for Rehearing be, and the same is, hereby denied.

DONE AND ORDERED at Miami, Florida, this 5th day of November, 1962.

/s/ Emett C. Choate
UNITED STATES DISTRICT JUDGE

cc: U. S. Attorney (Pearson)
Alvin Goodman, Esquire
348 Seybold Bldg.
Miami, Florida

[fol. 12]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION

No. 287-62-M-Cr-EC

[Title Omitted]

[File Endorsement Omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—filed December 5, 1962

I

NOTICE IS HEREBY GIVEN that the United States of America appeals to the Supreme Court of the United States from the Order dated November 5, 1962, and entered November 8, 1962, denying Appellant's Petition for Rehearing and from the Order dated September 17, 1962, and entered September 19, 1962, dismissing the Indictment which charged the defendants, DAVID THOMAS HEALY and LEONARD MALCOLM OETH, in two counts with violations of Title 18, United States Code, Section 1201 and Title 49, United States Code, Supp. III, Section 1472(i). This appeal is taken pursuant to Title 18, United States Code, Section 3731.

II

The Clerk will please prepare a transcript of the record for transmission to the Clerk of the Supreme Court of the United States and include therein the following:

1. Transcript of docket entries.
2. Indictment filed June 6, 1962.
3. Motion to Dismiss filed September 10, 1962.
4. Order Dismissing Indictment dated September 17, 1962, and entered September 19, 1962.
5. Petition for Rehearing filed October 3, 1962.
6. Order Denying Petition for Rehearing dated November 5, 1962 and entered November 8, 1962.
7. This Notice of Appeal to the Supreme Court of the United States.

[fol. 13] III

The following questions are presented by this appeal:

1. Whether the words "or otherwise" as used in the phrase "held for ransom or reward or otherwise" in the Federal Kidnapping Statute (Title 18, United States Code, Section 1201) are limited in their application to a holding of a kidnapped person for some pecuniary benefit to the defendants.

2. Whether the statute punishing aircraft piracy (Title 49, United States Code, Supp. III, Section 1472(i)), which by its term covers any "aircraft in flight in air commerce" is limited in its application to commercial aircraft engaged in the carriage of goods or persons for hire.

DATED this 5th day of December, 1962, at Miami, Florida.

EDITH HOUSE
UNITED STATES ATTORNEY

By: /s/ Daniel S. Pearson
Assistant United States
Attorney

[fol. 14]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 15]

SUPREME COURT OF THE UNITED STATES

No. 783, October Term, 1962

UNITED STATES, APPELLANT

vs.

DAVID THOMAS HEALY, ET AL.

ORDER NOTING PROBABLE JURISDICTION—April 15, 1963

APPEAL from the United States District Court for the Southern District of Florida.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1963 O-686388 1165

INDEX

CITATIONS

673595—63

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. ——

UNITED STATES OF AMERICA

v.

DAVID THOMAS HEALY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

JURISDICTIONAL STATEMENT

OPINION BELOW

The order of the district court dismissing the indictment (Appendix A, *infra*, pp. 10–11; R. 6) is not reported.

JURISDICTION

On September 17, 1962, the district court dismissed both counts of the indictment on the ground that they did not charge offenses under 18 U.S.C 1201 and 49 U.S.C. 1472(i) (R. 1–2, 6). A petition for rehearing was denied on November 5, 1962. A notice of appeal to this Court was filed in the district court on December 5, 1962 (R. 12–13). Title 18, Section 3731 of the United States Code confers jurisdiction upon this

Court to review on direct appeal the decision of the district court which dismissed both counts of the indictment on the ground that they did not charge crimes within the meaning of the statutes upon which they were founded.

QUESTIONS PRESENTED

1. Whether the words "or otherwise" as used in the phrase "held for ransom or reward or otherwise" in the Federal Kidnaping Act (18 U.S.C. 1201) are limited in their application to the holding of a kidnaped person for some pecuniary benefit to the defendants.

2. Whether the statute punishing aircraft piracy (49 U.S.C. 1472(i)), which by its terms covers any "aircraft in flight in air commerce," is limited in its application to commercial airliners engaged in the carriage of goods and persons for hire.

STATUTES INVOLVED

18 U.S.C. 1201 provides in part as follows:

> (a) Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.
>
> * * * * *

Public Law 87-197, enacted on September 5, 1961, 75 Stat. 466, amended Section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472) in part by adding:

AIRCRAFT PIRACY

(i)(1) Whoever commits or attempts to commit aircraft piracy, as herein defined, shall be punished—

(A) by death if the verdict of the jury shall so recommend, or, in the case of a plea of guilty, or a plea of not guilty where the defendant has waived a trial by jury, if the court in its discretion shall so order; or

(B) by imprisonment for not less than twenty years, if the death penalty is not imposed.

(2) As used in this subsection, the term "aircraft piracy" means any seizure or exercise of control, by force or violence or threat of force or violence and with wrongful intent, of an aircraft in flight in air commerce.

Section 101 of the Federal Aviation Act of 1958, 72 Stat. 737 (49 U.S.C. 1301) provides in part as follows:

SECTION 101. As used in this Act, unless the context otherwise requires—

* * * * * *

(4) "Air commerce" means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation or aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.

(5) "Aircraft" means any contrivance now known or hereafter invented, used, or designed for navigation of or flight in the air.

* * * * *

STATEMENT

Count 1 of an indictment [1] returned in the United States District Court for the Southern District of Florida charged that on April 13, 1962, the defendants Healy and Oeth did kidnap at gunpoint one Mead, the pilot of a Cessna 172 aircraft, and force him against his will to transport the aircraft from Dade County, Florida, to the Republic of Cuba for the purpose of transporting the defendants to Cuba in violation of 18 U.S.C. 1201 (*supra*, p. 2). Count 2 charged that on the same date said defendants, while passengers in the Cessna, committed aircraft piracy in violation of 49 U.S.C. 1472(i) (*supra*, p. 3) by unlawfully, at gunpoint, forcing the pilot to fly from Dade County, Florida, to the Republic of Cuba while operating within the limits of a federal airway so as directly to affect safety in interstate, overseas and foreign air commerce.

The district court granted a motion to dismiss both counts of the indictment (App. A, *infra*, pp. 10–11). As to Count 1 the court was of the opinion that it did not state an offense under 18 U.S.C. 1201 because of failure to allege that the person kidnaped was held for ransom or reward or otherwise, the Court "construing the word 'otherwise' as contained in the

[1] The two-count indictment (R.1–2) is printed as Appendix B, *infra*, pp. 12–14.

Statute to mean some like wrongful goal of the type such as ransom or reward, that is, of some pecuniary profit to the defendants" (App. A, *infra*, p. 10). The court dismissed Count 2 on the ground that the aircraft alleged to have been pirated was not "an aircraft in flight in air commerce" within the meaning of 49 U.S.C. 1472(i). The court construed this statutory language as being "applicable only to commercial airliners engaged in the carriage of goods and persons for hire" (App. A, *infra*, p. 11).

THE QUESTIONS ARE SUBSTANTIAL

In dismissing the indictment, the district court misconstrued the terms of the statutes upon which the two counts were founded. Its rulings are contrary to the expressed intent of Congress and, in the case of Count 1, contrary to the decision of this Court in *Gooch* v. *United States*, 297 U.S. 124, and the decisions of several courts of appeal.

1. Count 1 of the indictment charged that the kidnaping and transportation "was done for the purpose of transporting the said defendants from Dade County, Florida, in the United States of America, to the Republic of Cuba which was accomplished." The ruling of the district court that the victims were not held for "ransom or reward or otherwise" because the defendants were not seeking pecuniary gain is directly contrary to the decision in *Gooch* v. *United States*, *supra*, where this Court held that the transportation of police officers seized and held to prevent the arrest of their captors was an offense under the Federal Kidnaping Act (formerly 18 U.S.C. 408a,

now 18 U.S.C. 1201). This Court there rejected the very same argument accepted below in the instant case, *i.e.*, that, under the rule of *ejusdem generis*, the statutory words "ransom or reward or otherwise" are limited to some pecuniary consideration or payment of something of value. The Court cited the Senate and House Judiciary Committee reports[2] as showing that the amendment adding the word "otherwise" was intended by Congress to extend jurisdiction of the Act to "persons who have been kidnaped and held, not only for reward, but for any other reason * * *" (297 U.S. at 127, 128). Reasoning that the Act should extend to cases where there was some "expectation of benefit to the transgressor," this Court held that "[i]f the word reward, as commonly understood, is not itself broad enough to include benefits expected to follow the prevention of an arrest, they fall within the broad term, 'otherwise'" (297 U.S. at 128).

Here, the alleged purpose of the kidnaping was to obtain the transportation of the defendants from Florida to Cuba. The pilot was necessary to the purpose. Just as in *Gooch*, this was of benefit to the defendants and therefore within the scope of the Federal Kidnaping Act.[3]

---

[2] S. Rep. No. 534, 73d Cong., 2d Sess., March 22, 1934; H. Rep. No. 1457, 73d Cong., 2d Sess., May 3, 1934.

[3] See, also, the following lower federal court decisions, subsequent to *Gooch*, holding that the Act applies to interstate transportation of a kidnaped person held for purposes other than ransom or pecuniary reward: *Brooks* v. *United States*, 199 F 2d 336 (C.A. 4) (flogging of persons kidnaped by Ku Klux Klan members); *United States* v. *McGrady*, 191 F. 2d 829 (C.A. 7) (prisoners forcing kidnaped persons to drive car

2. As to Count 2, there is no question but that the Cessna airplane described in the indictment was an "aircraft" under 49 U.S.C. 1301(5) (*supra*, p. 4). The indictment clearly charged that this aircraft was engaged in "air commerce" as defined in 49 U.S.C. 1301(4) (*supra*, p. 3). It was alleged to have been operated "within the limits of a Federal airway," and so as to "directly affect safety in interstate, overseas and foreign air commerce." Count 2 also alleged that the defendants unlawfully forced the pilot at gunpoint and against his will to fly the aircraft from Dade County, Florida, to the Republic of Cuba, that is, in "interstate, overseas or foreign air commerce" (App. B, *infra*, pp. 13–14). Accordingly, Count 2 properly charged all the elements of an aircraft piracy of an aircraft in flight in air commerce under 49 U.S.C. 1472(i)(2) (*supra*, p. 3).

In dismissing Count 2 on the ground that the words "an aircraft in flight in air commerce" as used in 49 U.S.C. 1472(i) were applicable only to commercial airliners engaged in the carriage of goods and persons for hire (App. A, *infra*, p. 11), the district court imposed an unwarranted limitation upon the statute. There is nothing in its language to support such an interpretation. Furthermore, the legislative history of the Aircraft Piracy Act shows that the term "air commerce" was used designedly because of its broad

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to aid escape); *United States* v. *Bazzell*, 187 F. 2d 878 (C.A. 7), certiorari denied, 342 U.S. 849 (placing victim in house of prostitution); *United States* v. *Parker*, 103 F. 2d 857 (C.A. 3), certiorari denied, 307 U.S. 642 (extortion of confession to enhance reputation of kidnaper as detective).

scope, and that Congress intended the term to apply to private as well as business and commercial planes. Thus, the House Report, No. 958, 87th Cong., 1st Sess., p. 8, which accompanied the bill ultimately enacted, states:

> The term "air commerce" was used designedly in this proposed new subsection [i], and in the proposed new subsections (j) and (k), because of its broad scope. The term is defined in existing law to include not only interstate, overseas, and foreign air commerce and the transportation of mail by aircraft, but also any operation or navigation of aircraft in a Federal airway or any such operation or navigation which directly affects, or may endanger safety in, interstate, overseas, or foreign air commerce.

This same report also states that these subsections would apply in the case of "private aircraft" (*id.* at 15). In the debates on this bill Congressman Harris stated (107 Cong. Rec. 16545):

> The term "air commerce" was used designedly because of its broad scope. * * * Thus, thousands of business and private aircraft, as well as air carrier aircraft, are covered.

To the same effect, see page 56 of the Hearings before the Aviation Subcommittee of the Senate Committee on Commerce on S. 2268, 87th Cong., 1st Sess., August 4, 1961, the corresponding Senate bill.

CONCLUSION

It is respectfully submitted that, for the foregoing reasons, this Court should note jurisdiction and reverse the judgment below.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

FEBRUARY 1963.

APPENDIX A

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT of FLORIDA, MIAMI DIVISION

No. 287-62-M-Cr-EC

UNITED STATES OF AMERICA

v.

DAVID THOMAS HEALY, ALSO KNOWN AS HARROLD MOORE, AND LEONARD MALCOLM OETH, ALSO KNOWN AS JAMES A. EASTHAM

ORDER

THIS CAUSE having come on upon Motion to Dismiss the Indictment filed on behalf of the defendant, David Thomas Healy, and the Court having heard argument of counsel and being fully advised in the premises, it is, thereupon,

ORDERED AND ADJUDGED:

1. That Count One of the Indictment be, and the same is, hereby dismissed, the Court being of the opinion that such count does not state an offense under Title 18, United States Code, Section 1201, in that it fails to allege that Woodruff Mead was kidnapped and held "for ransom or reward or otherwise", the Court construing the word "otherwise" as contained in the Statute to mean some like wrongful goal of the type such as ransom or reward, that is, of some pecuniary profit to the defendants.

2. That Count Two of the Indictment be, and the same is, hereby dismissed, the Court being of the opinion that the aircraft alleged to have been pirated is not "an aircraft in flight in air commerce" as defined in Title 49, United States Code, Section 1472(i), the Court construing the quoted language of the Statute as being applicable only to commercial airliners engaged in the carriage of goods and persons for hire.

3. That the outstanding warrant for the arrest of Leonard Malcolm Oeth upon this Indictment be, and the same is, hereby canceled.

DONE AND ORDERED at Miami, Florida, this 17th day of September 1962.

/s/ EMETT C. CHOATE,
United States District Judge.

APPENDIX B

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION

No. 287-62-M-Cr.

18 U.S.C. § 1201 (Life)
49 U.S.C. § 1472(i)
M/S Death—NLT 20 yrs.

UNITED STATES OF AMERICA

v.

DAVID THOMAS HEALY, ALSO KNOWN AS HARROLD MOORE, AND LEONARD MALCOLM OETH, ALSO KNOWN AS JAMES A. EASTHAM

INDICTMENT

The Grand Jury charges:

Count One

That on or about April 13, 1962, in the Southern District of Florida,

DAVID THOMAS HEALY, also known as Harrold Moore, and
LEONARD MALCOLM OETH, also known as James A. Eastham

did knowingly and unlawfully kidnap, transport and cause to be transported in foreign commerce from Dade County, Florida, in the United States of America, to the Republic of Cuba, a person, to-wit: Woodruff Mead, by forcing him at gunpoint and against his will to fly an airborne aircraft which he was then

piloting, to-wit: a four-passenger Cessna 172, Serial Number 28368, Federal Aviation Agency License N5768A, to the Republic of Cuba, which said kidnapping and transportation was done for the purpose of transporting the said defendants from Dade County, Florida, in the United States of America, to the Republic of Cuba which was accomplished, and after which Woodruff Mead was liberated unharmed from the unlawful custody and control of the said defendants; in violation of Title 18, United States Code, Section 1201.

Count Two

That on or about April 13, 1962, in the Southern District of Florida,

DAVID THOMAS HEALY, also known as Harrold Moore, and

LEONARD MALCOLM OETH, also known as James A. Eastham

did commit aircraft piracy in that the said defendants, while passengers therein, did, with wrongful intent, seize an aircraft in flight in air commerce by threat of force and violence and did, with wrongful intent, exercise control of an aircraft in flight in air commerce by threat of force and violence, that is, the said defendants did unlawfully force a pilot, Woodruff Mead, at gunpoint and against his will, to fly an airborne aircraft, to-wit: a four-passenger Cessna 172, Serial Number 28368, Federal Aviation Agency License N5768A, from Dade County, Florida, in the United States of America, to the Republic of Cuba, which said aircraft Woodruff Mead was piloting and operating within the limits of a Federal airway at the time it was unlawfully seized by the said defendants and at times thereafter, while under

the unlawful control of the said defendants imposed through threat of force and violence, and which said aircraft Woodruff Mead was, at all times pertinent, piloting and operating so as to directly affect safety in interstate, overseas and foreign air commerce, while under the unlawful control of the said defendants imposed through threat of force and violence; all in violation of Title 49, United States Code, Section 1472(i).

A True Bill,

s/ HARRY P. CAIN,
Foreman.

EDWARD F. BOARDMAN,
United States Attorney.

By: s/ Edmond J. Gong,
EDMOND J. GONG,
Assistant United States Attorney.

U.S. GOVERNMENT PRINTING OFFICE: 1963

No. [illegible] 64

October Term, 1963

UNITED STATES OF AMERICA

v.

DAVID THOMAS HEALY, et al

On Appeal from the [illegible] United States District Court for the Southern District of Florida

MOTION TO DISMISS APPEAL

R. R. KUNKEL
1022 Seybold Building
Miami, Florida

ROBERT L. SHEVIN
ALVIN GOODMAN
SYLVAN N. KOLTZMAN
HARRY M. ROSEN
944 Seybold Building
Miami, Florida
Attorneys for Appellees

IN THE

Supreme Court of the United States

No. _____

October Term, 1962

UNITED STATES OF AMERICA

v.

DAVID THOMAS HEALY, et al

On Appeal from the United States District Court for the Southern District of Florida

MOTION TO DISMISS APPEAL

Appellee moves this Honorable Court to dismiss the appeal herein on the ground that the Appellant's Notice of Appeal was not filed within the time allowed by law.

JURISDICTIONAL ARGUMENT

The Judgment or Order appealed from herein is the Order granting the Motion dismissing both counts of the indictment, which was entered by the District Court on September 17, 1962. The Appellant admits that this appeal is from this Order on page 1 and 2 of its Jurisdictional Statement. The Notice of Appeal was not filed

until December 5, 1962; seventy-nine days after the entry of the Order appealed from.

Rule 11 (2) of the Supreme Court Rules provides that:

> "An appeal permitted by law from a District Court to this Court in a criminal case shall be in time when the Notice of Appeal prescribed by Rule 10 is filed with the Clerk of the District Court within thirty days after the entry of the Order or Judgment appealed from".

It is well settled that neither the trial courts nor the appellate courts can extend the time for appeal. Fed. Rules Crim. Proc., 45 (b); *United States* v. *Robinson*, 361 U.S. 220, 80 S. Ct. 282 (1960).

Research fails to reveal a single case or statute authorizing the appellant to file a petition for rehearing of an Order dismissing an indictment, much less any law holding that such a Motion tolls the time for appeal. To allow the United States to stop the running of the time for appeal by filing a petition of this nature, would give the government the power to extend the time for appeal, in such cases, indefinitely.

If this appeal is not from the Order dismissing the indictment but from the Order entered November 5, 1962 denying the Petition for Rehearing, this Court lacks jurisdiction, as this appeal is outside the scope of title 18 section 3731 of the United States Code; see *United States* v. *Apex Distributing Co.*, 270 F. 2nd 747 (9th Cir. 1959). Statutes permitting criminal appeals on the part of the

United States have always been strictly construed because government appeals in such cases are uncommon, exceptional and unfavored. *Carroll* v. *United States*, 354 U.S. 394, 77 S. Ct. 1332 (1957); *United States* v. *Bordon Co.*, 308 U.S. 188, 60 S. Ct. 182 (1939).

CONCLUSION

It is respectfully submitted to this Honorable Court that this appeal is untimely, or in the alternative is not allowed by title 18, section 3731 of the United States Code and should be dismissed for lack of jurisdiction.

Respectfully submitted,

R. E. KUNKEL

ROBERT L. SHEVIN
ALVIN GOODMAN
SYLVAN N. HOLTZMAN
HARRY M. ROSEN

February 27, 1963.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appellees' Motion to Dismiss has, pursuant to Rule 33 (1) of the Revised Rules of the Supreme Court of the United States, been served by mail upon ARCHIBALD COX, Solicitor General, Department of Justice, Washington 25, D. C., by air mail, and hand delivered upon EDWARD F. BOARDMAN, United States Attorney of the Southern District of Florida, Federal Building, Miami, Florida, this 20th day of February, 1963.

A E Rundle

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 783

UNITED STATES OF AMERICA

v.

DAVID THOMAS HEALY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

RESPONSE TO MOTION TO DISMISS APPEAL

There is no merit to respondents' motion that the government's appeal be dismissed as untimely filed. Although the district court dismissed both counts of the indictment on September 17, 1962, a petition for rehearing was filed on October 17, 1962, and the order denying this petition was filed on November 8, 1962. The notice of appeal filed on December 5, 1962, within 30 days after the denial of the petition for rehearing, was timely. See Rule 37(a)(2), Fed. Rules Crim. Proc.

It is well settled that where a district court entertains a petition for rehearing, the judgment of the

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court as originally entered does not become final until the denial of rehearing, and the time to appeal runs from the date of the denial of rehearing. *Wayne Gas Co.* v. *Owens Co.*, 300 U.S. 131, 137–138; *Bowman* v. *Loperena*, 311 U.S. 262, 264–266; and cases cited.[1] This rule is probably inapplicable where the petition for rehearing is filed after the time for appeal has expired, merely for the purpose of extending the time for appeal. See *Wayne Gas Co.* v. *Owens Co.*, 300 U.S. 131, 136. That principle, however, has no application here. The government's petition for rehearing was filed within the time for appeal (within 30 days after the original judgment) and was filed to call the attention of the district court to considerations, including a controlling decision of this Court, which the government believed conclusively showed the error in the court's original judgment.

It is therefore respectfully submitted that the motion to dismiss the appeal should be denied.

ARCHIBALD COX,
Solicitor General.

MARCH 1963.

[1] *United States* v. *Apex Distributing Co.*, 270 F. 2d 747 (C.A. 9), holding that the government could not appeal under 18 U.S.C. 3731 from the dismissal of a criminal case because of the government's refusal to comply with pre-trial discovery orders, has no bearing on the situation here where the appeal does clearly lie under the Criminal Appeals Act and the only issue raised is timeliness.

U.S. GOVERNMENT PRINTING OFFICE: 1963

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UNITED STATES OF AMERICA

v.

DAVID THOMAS HEALY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The order of the district court dismissing the indictment (R. 7-8) is not reported.

JURISDICTION

The judgment of the district court dismissing the indictment was filed on September 19, 1962 (R. 2, 7-8). A petition for rehearing was filed on October 17, 1962, and denied on November 8, 1962 (R. 2, 9-12). Notice of appeal was filed on December 5,

1962 (R. 2, 13-14) and on April 15, 1963, probable jurisdiction was noted (R. 15; 372 U.S. 963). The jurisdiction of this Court rests upon 18 U.S.C. 3731.

QUESTIONS PRESENTED

1. Whether the words "or otherwise" as used in the phrase "held for ransom or reward or otherwise" in the Federal Kidnaping Act (18 U.S.C. 1201) are limited in their application to the holding of a kidnaped person for some pecuniary benefit to the defendants.

2. Whether the statute punishing aircraft piracy (49 U.S.C. 1472(i)), which by its terms covers any "aircraft in flight in air commerce," applies only to commercial airliners engaged in the carriage of goods and persons for hire.

STATUTES INVOLVED

18 U.S.C. 3731 provides in part as follows:

Appeal by United States.

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

* * * *

18 U.S.C. 1201 provides in part as follows:

(a) Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

* * * * *

Public Law 87-197, enacted on September 5, 1961, 75 Stat. 466, amended Section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472) in part by adding:

AIRCRAFT PIRACY

(i) (1) Whoever commits or attempts to commit aircraft piracy, as herein defined, shall be punished—

(A) by death if the verdict of the jury shall so recommend, or, in the case of a plea of guilty, or a plea of not guilty where the defendant has waived a trial by jury, if the court in its discretion shall so order; or

(B) by imprisonment for not less than twenty years, if the death penalty is not imposed.

(2) As used in this subsection, the term "aircraft piracy" means any seizure or exercise of control, by force or violence or threat of force or violence and with wrongful intent, of an aircraft in flight in air commerce.

Section 101 of the Federal Aviation Act of 1958, 72 Stat. 737 (49 U.S.C. 1301) provides in part as follows:

> Section 101. As used in this Act, unless the context otherwise requires—
>
> * * * *
>
> (4) "Air commerce" means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation or [*sic*] aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.
>
> (5) "Aircraft" means any contrivance now known or hereafter invented, used, or designed for navigation of or flight in the air.
>
> * * * *

STATEMENT

Count 1 (R. 3) of an indictment returned in the United States District Court for the Southern District of Florida charged that on April 13, 1962, in violation of 18 U.S.C. 1201 (*supra*, p. 3), the defendants kidnaped, at gunpoint, one Mead, the pilot of a Cessna 172 aircraft, and forced him, against his will, to fly the plane from Dade County, Florida, to the Republic of Cuba for the purpose of transporting the defendants to Cuba. Count 2 (R. 4) charged that on the same date the defendants, while passengers in the Cessna, committed aircraft piracy in violation of 49 U.S.C. 1472(i) (*supra*, p. 3) by unlawfully, at gunpoint, forcing the pilot to fly

from Dade County, Florida, to the Republic of Cuba while operating within the limits of a federal airway so as directly to affect safety in interstate, overseas and foreign air commerce.

The district court ordered both counts of the indictment dismissed (R. 2, 7-8). It held that Count 1 failed to state an offense under 18 U.S.C. 1201 in that it did not allege that the person kidnaped was held "for ransom or reward or otherwise," because that phrase is confined to purposes which, like ransom or reward, involve some pecuniary profit to the defendants (R. 7). The court dismissed Count 2 on the ground that the aircraft alleged to have been pirated was not "an aircraft in flight in air commerce" within the meaning of 49 U.S.C. 1472(i), ruling that this statutory language is "applicable only to commercial airliners engaged in the carriage of goods and persons for hire" (R. 7-8).

SUMMARY OF ARGUMENT

I

Count 1, charging that the aircraft pilot had been kidnaped for the purpose of transporting the defendants from Florida to Cuba, stated an offense under 18 U.S.C. 1201 even though there was no claim that the victim was held for pecuniary profit. The district court's ruling that the victim was not held for "ransom or reward or otherwise" in that the defendants were not seeking financial profit is directly contrary to the Court's decision in *Gooch* v. *United States*, 297 U.S. 124, holding that the transporta-

tion of police officers seized and held to prevent the arrest of their captors is a violation of the Federal Kidnaping Act (formerly 18 U.S.C. (1940 ed.) 408a, now 18 U.S.C. 1201).

In *Gooch* the Court rejected the very same argument accepted by the district court here, *i.e.*, that under the rule of *ejusdem generis* the statutory words "ransom or reward or otherwise" are limited to some pecuniary benefit or the payment of a valuable consideration. The legislative history makes it quite clear that the purpose of Congress in adding to the statute the words "or otherwise" was—as this Court stated in *Gooch*—to extend the Act's coverage to "persons who have been kidnaped and held, not only for reward, but for any other reason * * *" (297 U.S. at 127-128).

The lower federal courts have consistently followed *Gooch* in holding that the Act is violated if the restraint of the party kidnaped is of some benefit to the captor, without regard to whether that benefit is pecuniary to him.

II

Section 902 of the Federal Aviation Act, as amended in 1961, defines the crime of "air piracy" as "any seizure or exercise of control, by force or violence or threat of force or violence and with wrongful intent, of an aircraft in flight in air commerce." The definition of "air commerce," contained in Section 101(4), embraces not only "interstate, overseas, or foreign air commerce" as such, but also "any operation or navigation or [*sic*] aircraft with-

in the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce."

Count 2 of the indictment plainly charged all the elements of an aircraft piracy within the meaning of these sections. In dismissing count 2 on the ground that the phrase "aircraft in flight in air commerce" applies only to commercial airliners engaged in the carriage of persons and goods for hire, the district court read into the Act a limitation which has no basis either in the text or legislative history of the statute. When Congress wished to frame a provision applicable only to air carriers, it knew how to do so; for subsection (l) of Section 902, adopted at the same time as the air piracy subsection, outlaws the carrying of deadly or dangerous weapons on "an air carrier in air transportation." If there remained any doubt as to the scope of Section 902(i), it would be laid to rest by the legislative history of the 1961 amendment. The House Report which accompanied the bill, the floor debates in both Houses, and testimony in hearings before a Senate subcommittee all make it crystal clear that the phrase "air commerce" includes privately owned, as well as commercial, aircraft.

ARGUMENT

I

The Federal Kidnaping Act (18 U.S.C. 1201), Which Prohibits the Interstate Transportation of Any Person Kidnaped and Held "For Ransom or Reward or Otherwise," Is Not Confined In Its Application To Cases In Which the Kidnaper Seeks Some Pecuniary Benefit

The Federal Kidnaping Act (18 U.S.C. 1201) makes it a crime knowingly to transport in interstate or foreign commerce any person who has been kidnaped and held "for ransom or reward or otherwise." Here, Count 1 of the indictment charged that the "kidnapping and transportation was done for the purpose of transporting the said defendants from Dade County, Florida * * * to the Republic of Cuba * * *." The decision below—to the effect that the victim was not held for "ransom or reward or otherwise" because the defendants were not seeking pecuniary profit—is directly contrary to the decision of this Court in *Gooch* v. *United States*, 297 U.S. 124, holding that the transportation of police officers seized and held to prevent the arrest of their captors was an offense under the Act. The *Gooch* decision rejected the very same argument accepted by the district court here, *i.e.*, that under the rule of *ejusdem generis* the statutory words "ransom or reward or otherwise" are limited to pecuniary benefits or to the payment of some valuable consideration. The Court cited the reports of the Senate and House Judiciary Committees as showing that the amendment of May 18, 1934 (18 U.S.C. 408a, 48 Stat. 781-782)—which added the words "or otherwise"—was

intended by Congress to extend the Act's coverage to "persons who have been kidnaped and held, not only for reward, but for any other reason * * *" (297 U.S. at 127-128). Thus, the Senate Judiciary Committee, in recommending passage of the amendment had stated: [1]

> The purpose and need of this legislation are set out in the following memorandum from the Department of Justice:
>
> S. 2252; H.R. 6918: This is a bill to amend the Act forbidding the transportation of kidnaped persons in interstate commerce—act of June 22, 1932 (U.S.C., ch. 271, Title 18, sec. 408a), commonly known as the "Lindbergh Act." This amendment adds thereto the word "otherwise" so that the act as amended reads: "Whoever shall knowingly transport * * * any person who shall have been unlawfully seized * * * and held for ransom or reward or otherwise shall, upon conviction, be punished * * *." *The object of the addition of the word "otherwise" is to extend the jurisdiction of this act to persons who have been kidnaped and held, not only for reward, but for any other reason.*
>
> In addition, this bill adds a proviso to the Lindbergh Act to the effect that in the absence of the return of the person kidnaped and in the absence of the apprehension of the kidnaper during a period of 3 days, the presumption arises that such person has been transported in interstate or foreign commerce, but such presumption is not conclusive.

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[1] S. Rep. No. 534, 73d Cong., 2d Sess., March 22, 1934.

> I believe that this is a sound amendment which will clear up border-line cases, justifying Federal investigation in most of such cases and assuring the validity of Federal prosecution in numerous instances in which such prosecution would be questionable under the present form of this act. [Emphasis added.]

Similarly, the House Judiciary Committee declared: [2]

> This bill, as amended, proposes three changes in the act known as the "Federal Kidnaping Act." First, it is proposed to add the words "or otherwise, except, in the case of a minor, by a parent thereof." This will extend Federal jurisdiction under the act to persons who have been kidnaped and held, not only for reward, but *for any other reason*, except that a kidnaping by a parent of his child is specifically exempted. [Emphasis added.]

Reasoning that the Act should extend to cases where there was some "expectation of benefit to the transgressor," the Court held in *Gooch* that "[i]f the word reward, as commonly understood, is not itself broad enough to include benefits expected to follow the prevention of an arrest, they fall within the broad term, 'otherwise'" (297 U.S. at 128). Here, the alleged purpose of the kidnaping was to obtain the transportation of the defendants from Florida to Cuba. The kidnaping of the pilot was

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[2] H.Rep. No. 1457, 73d Cong., 2d Sess., May 3, 1934, p. 2.

essential to that end and therefore, just as in *Gooch*, was of benefit to the defendants and within the scope of the Federal Kidnaping Act.

Subsequent to *Gooch*, the lower federal courts have consistently adhered to the view that the Federal Kidnaping Act is violated if the restraint of the party kidnaped is of some benefit to the captor, whether or not that benefit is pecuniary. Thus in *United States* v. *Parker*, 103 F. 2d 857, 860-861 (C.A. 3), certiorari denied, 307 U.S. 642, the court of appeals held that the statute was violated where the purpose of the kidnaping was to extort a confession from the victim and thereby enhance the reputation of the kidnaper as a detective. The court stated:

> The statute prohibits the interstate transportation of persons kidnapped for other reasons than ransom or reward. It is not restricted to cases involving pecuniary benefit to the kidnappers. *Gooch* v. *United States*, 297 U.S. 124, 56 S. Ct. 395, 80 L. Ed. 522. We think that Congress by the phrase "or otherwise" intended to include any object of a kidnapping which the perpetrator might consider of sufficient benefit to himself to induce him to undertake it.

See, also, *Brooks* v. *United States*, 199 F. 2d 336 (C.A. 4) (to flog victims kidnaped by Ku Klux Klan); *Wheatley* v. *United States*, 159 F. 2d 599, 600 (C.A. 4) (to secure transportation in victim's automobile); *Bearden* v. *United States*, 304 F. 2d 532 (C.A. 5), certiorari granted and judgment vacated on another ground, 372 U.S. 252 (to steal aircraft for captor's transportation); *United States* v. *McGrady*, 191 F. 2d

829 (C.A. 7) (to force victims to aid kidnapers in escaping from prison); *United States* v. *Bazzell*, 187 F. 2d 878, 882 (C.A. 7), certiorari denied, 342 U.S. 849 (to place victim in house of prostitution); *Hayes* v. *United States*, 296 F. 2d 657, 666 (C.A. 8), certiorari denied, 369 U.S. 867 (to obtain transportation by victim in automobile); *Hess* v. *United States*, 254 F. 2d 578, 584 (C.A. 8) (to obtain transportation by victim in automobile); *Sanford* v. *United States*, 169 F. 2d 71 (C.A. 8) (to rob victim); *Langston* v. *United States*, 153 F. 2d 840 (C.A. 8) (to rob victim and prevent him from reporting automobile theft); *Poindexter* v. *United States*, 139 F. 2d 158 (C.A. 8) (to rape victim).

II

Section 902(i) of the Federal Aviation Act, Which Outlaws Air Piracy With Respect To "Any Aircraft In Flight In Air Commerce," Is Applicable Not Only To Commercial Airliners But To Private Aircraft As Well

Section 902 of the Federal Aviation Act of 1958, 49 U.S.C. 1472 (i), as amended in 1961,[3] makes

[3] S. 2268, the bill amending Section 902, was passed by the Senate, after debate, on August 10, 1961 (107 Cong. Rec. 15440). On August 14, 1961, it was referred to the House Committee on Interstate and Foreign Commerce (*id.*, p. 15796). On August 16, H.R. 8384, the House version of the amendments was reported to the House (H. Rep. No. 958) (*id.*, p. 16084). On August 21, H.R. 8384 was passed by the House (*id.*, pp. 16543, 16555). On August 23, the House amended S. 2268 by adding provisions of H.R. 8384, and passed S. 2268 as amended. The proceedings by which H.R. 8384 had been passed were vacated and that bill was laid on the table (*id.*, pp. 16848-16849). After the Senate had con-

punishable by fine or imprisonment the crime of "aircraft piracy," which it defines as

> any seizure or exercise of control, by force or violence or threat of force or violence and with wrongful intent, of an aircraft in flight in air commerce.

Section 101(4) of the Act, 49 U.S.C. 1301, defines the term "air commerce" as

> interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation or [*sic*] aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.

Subsection (5) of the same section defines the term "aircraft" as

> any contrivance now known or hereafter invented, used, or designed for navigation of or flight in the air.

Here, the Cessna airplane described in Count 2 of the indictment was plainly an "aircraft." The indictment charged that this aircraft was "in flight in air commerce;" that it was operated "within the limits of a Federal airway;" and that it was operated "so as to directly affect safety in interstate, overseas and for-

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curred in the House amendment and S. 2268 had been signed in both Houses (*id.*, pp. 17169-17174, 17302, 17445), it was approved by the President as Public Law 87-197 on September 5, 1961 (*id.*, p. 18311). The part of this Act covering "aircraft piracy" is 49 U.S.C. 1472(i), *supra*, p. 3.

eign air commerce." It further alleged that the defendants, with wrongful intent, exercised control of the aircraft by threat of force and violence, and unlawfully forced the pilot, at gunpoint, to fly the plane from Dade County, Florida, to the Republic of Cuba (R. 4). Thus, Count 2 properly charged all the elements of an aircraft piracy within the meaning of the Act.

In dismissing Count 2 on the ground that the phrase "aircraft in flight in air commerce" applied only to commercial airliners engaged in the carriage of goods and persons for hire (R. 7-8), the district court read into the Act a limitation which has no basis either in the text or legislative history of the statute. On its face, Section 902(i) applies without reservation to *any* aircraft which is in flight in "air commerce"; and the definition of "air commerce" embraces not only interstate, overseas, or foreign air commerce as such, but also any operation of any aircraft within the limits of a federal airway, or any operation of any aircraft which affects or may endanger safety in interstate, overseas, or foreign air commerce. Under this statutory scheme there is not the slightest justification for an interpretation which would confine the air piracy prohibition to carriers of goods and services for hire. Moreover, it is evident that when Congress wished to frame a provision applicable only to air carriers, it knew how to do so. For subsection (l) of Section 902, adopted at the same time as the air piracy subsection, outlaws the carrying of deadly or dangerous weapons on "an air carrier in air transportation."

If the text left any doubt as to the scope of Section 902(i), it would be laid to rest by the legislative history of the 1961 amendment. The House report which accompanied the bill (H. Rep. No. 958, 87th Cong., 1st Sess.) referred to the urgent need for stronger laws respecting criminal acts committed aboard "commercial and private aircraft" (at p. 3), and stated (at p. 8):

> The term "air commerce" was used designedly in this proposed new subsection [i], and in the proposed new subsections (j) and (k), because of its broad scope. The term is defined in existing law to include not only interstate, overseas, and foreign air commerce and the transportation of mail by aircraft, but also any operation or navigation of aircraft in a Federal airway or any such operation or navigation which directly affects, or may endanger safety in, interstate, overseas, or foreign air commerce.

The same report explicitly declared, moreover, that the subsections referring to "aircraft in flight in air commerce"—as distinguished from "aircraft being operated by an air carrier in air transportation", the phrase used in subsection (l)[4]—would apply in the case of "private aircraft" (*id.* at 15). In the floor debate, Congressman Harris, after restating the explanation of the term "air commerce" set forth in the report, noted (107 Cong. Rec. 16545) that

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[4] This distinction between subsections (i), (j), and (k) and subsection (l) of Public Law 87-197, amending section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472) was also made by Congressman Williams in the debates (107 Cong. Rec. 16547-16548).

"thousands of business and private aircraft, as well as air carrier aircraft, are covered."

Similarly, in Hearings before the Aviation Subcommittee of the Senate Committee on Commerce, 87th Cong., 1st Sess., on S. 2268, William K. Lawton, Executive Director of the National Business Aircraft Association, reminded Senator Engle, who had introduced the bill, that (at p. 56):

> * * * The proposals made in this bill affect every civil aircraft in the United States, and the reason I make this statement pointedly is that we have no desire to see the psychopaths, the weirdos, coming to the private aircraft and pointing guns because they realize from publicity that they cannot get away with it on airlines.

In the Senate debates, Senator Engle, responding to Senator Bush's query as to whether the bill applied to private aircraft, replied (107 Cong. Rec. 15243): "Yes, it applies to all airplanes in air commerce, which includes, of course, not only commercial aircraft, but private airplanes as well." And shortly afterward, this time in response to an inquiry by Senator Case as to the meaning of "air commerce", Senator Engle emphasized (107 Cong. Rec. 15243) that the statutory definition "is broad enough, as pointed out by the Airline Pilots Association, to take in privately owned as well as commercial aircraft." [5]

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[5] Senator Allott, in pointing out that the problem of the hijacking of aircraft is "not limited alone to airliners," referred to the hijacking by a Cuban jet fighter and the forced landing at Havana, Cuba, of a private Twin Bonanza plane owned by two United States citizens flying from Key West, Florida, to Nicaragua (107 Cong. Rec. 15425). See also

In sum, the legislative history forcefully confirms what the text of the Act would alone make clear: that the phrase "aircraft in flight in air commerce," as used in 49 U.S.C. 1472(i), designedly covers private aircraft as well as commercial airliners. Indeed, such coverage is essential if the statute is to achieve one of its cardinal purposes—to insure the safety of interstate air commerce. For when threatening weapons are employed against the pilot of an aircraft in flight, the menace of a fatal crash or collision—imperiling not only the pirated plane itself, but also other planes in the same airlane or persons on the ground—is present, whether the particular plane be commercially operated or "private."

CONCLUSION

For the reasons stated, we respectfully submit that this Court should reverse the judgment below and reinstate both counts of the indictment.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

JULY 1963

Hearings before the Aviation Subcommittee of the Senate Committee on Commerce on S. 2268, 87th Cong., 1st Sess., August 4, 1961, p. 57, where this incident is discussed.

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IN THE

Supreme Court of the United States

No. 64

October Term, 1963

UNITED STATES OF AMERICA

v.

DAVID THOMAS HEALY, et al.

On Appeal from the United States District Court for the Southern District of Florida

---

BRIEF FOR DAVID THOMAS HEALY, ET AL.

R. E. KUNKEL
1022 Seybold Building
Miami, Florida

ROBERT L. SHEVIN
ALVIN GOODMAN
SYLVAN N. HOLTZMAN
HARRY M. ROSEN
346 Seybold Building
Miami, Florida
Attorneys for Appellees

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OPINION BELOW

The order of the district court dismissing the indictment is not reported. (R. 7-8)

JURISDICTION

This appeal is from the judgment or order dismissing both counts of the indictment, which was entered by the District Court on September 17, 1962. The appellant's appeal from this order is only permitted by virtue of 18 U.S.C. 3731 which provides in part as follows:

> An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded. . . .

The appellant's Notice of Appeal from the order dismissing the indictments was not filed until December 5, 1962; 79 days after the entry of the order appealed from.

Rule 11(2) of the Supreme Court provides the time within which an appeal must be filed:

> "An appeal permitted by law from a District Court to this Court in a criminal case shall be in time when the Notice of Appeal prescribed by Rule 10 is filed with the Clerk of the District Court within thirty days after the entry of the Order or Judgment appealed from."

The appellant's Notice of Appeal from the order dismissing the indictments was not within thirty days after the entry of said order, and therefore, was untimely.

The time for appeal is jurisdictional and cannot be extended by the trial courts or the appellate courts. *United States* v. *Quon*, 241 F. 2d. 161 (1957), *Huff* v. *United States*, 192 F. 2d. 911 (1951). In *Huff* v. *United States*, supra, the court states the following:

> "Appellate jurisdiction in the Federal Court is purely statutory and there is no right to appeal save as it is granted by statute or a rule of court, which is authorized by Congress and has the force of law. The purpose of rules limiting the time for which appeals may be taken is to force an early termination of criminal cases. . . . They are designed to affix a definite, ascertainable point in time when litigation shall be at an end unless an appeal has been taken within the time prescribed. They embody considerations of certainty and stability which from the earliest times have been regarded as of first importance. . . . When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which appeal can be taken would be a dead letter."

Research fails to reveal a single criminal case or statute authorizing the appellant to file a motion for rehearing in the instant case, much less any law holding that such a motion extends the time for appeal. To allow the United States to stop the running of the time for appeal by filing a petition of this nature, would give the government the power to extend the time for appeal, in such cases, indefinitely.

Appellant cites only civil cases, clearly not applicable in the instant criminal case, in its response to the Motion to Dismiss Appeal, for the proposition that the time for appeal commences to run from the date of the denial of the rehearing. In addition, appellant relies on Rule 37(a)(2) Federal Rules of Criminal Procedure, which provides:

> "Time for taking appeal. An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, with a motion for a new trial or an arrest of judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. . . . An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from."

This rule specifically allows the defendant to stay the running of time for appeal by Motion for New Trial or Motion in Arrest of Judgment. However, conspicuously omitted from the right of government to appeal within thirty days from "the entry of the Judgment or Order appealed from" is any corrolary right of the government to extend the time for appeal. Clearly, if the government was to have the right to file motions extending the time for appeal, this rule would have expressly so provided.

In *United States* v. *Robinson*, 361 U.S. 220 (1960), this Court stated at 222,

> "The single question presented is whether the filing of a notice of appeal in a criminal case after expiration of the time prescribed in Rule 37 (a)(2) confers jurisdiction of the appeal upon the Court of Appeals if the District Court, proceeding under Rule 45(b), has found that the late filing of the notice of appeal was the result of the excusible neglect."

This Court discussing this issue stated at 229:

> "Rule 45(b) says in plain words that the '. . . Court may not enlarge . . . the period for taking an appeal.' The courts have uniformly held that the taking of an appeal within the prescribed time is mandatory and jurisdictional. The history of Rule 45(b) shows that consideration was given to the matter of vesting a limited discretion in the courts to grant an extention of time for the taking of an appeal, but, upon further consideration, the idea was deliberately abandoned."

This Court, after fully examining the language of the Rules of Criminal Procedure 45(b), its legislative history and the decisions interpreting it, reversed the appellate court and stated at 229:

> "It follows that the plain words, the judicial interpretations, and the history of Rule 45(b) not only fail to support, but actually oppose, the conclusion of the Court of Appeals, and therefore its judgment cannot stand."

In *United States* v. *Quon*, supra, the court held that the denial of a Motion for Reargument by the defendant, does not extend the time for appealing from the original order. Therefore, even if the government has a right to file a Motion for Rehearing or Reargument, the time for appeal from the original order is not extended. If this appeal is not from the order dismissing the indictment, but from the order denying the petition for rehearing, this court lacks jurisdiction as this appeal would be outside the scope of

Title 18 Section 3731 of the United States Code, as the statute limits direct appeals from this court to orders dismissing the indictment.

Statutes permitting criminal appeals on the part of the United States have always been strictly construed because government appeals in such cases are uncommon, exceptional and unfavored. *Carroll* v. *United States*, 354 U.S. 394, (1957); *United States* v. *Bordon Co.*, 308 U.S. 188, (1939). This Court in the *Carroll* case, supra, stated at 399:

> "The history shows resistance of the court to the opening of an appellate rule for the government until it was plainly provided by the Congress, and after that a close restriction of its uses to those authorized by statute."

It is respectfully submitted that the government's appeal from the order dismissing the indictments is untimely, or in the alternative, if the government's appeal is from the order denying the petition for rehearing, it is clearly outside the scope of appeals permitted by the United States in Title 18 Section 3731 of the United States Code and therefore, this court should dismiss the appeal for lack of jurisdiction.

QUESTIONS PRESENTED

1. Whether the Federal Kidnaping Act (18 U.S.C. 1201) is applicable to situations wherein there is an unlawful transportation for a lawful purpose.

2. Whether the statute punishing aircraft piracy (49 U.S.C. 1472(i)), which by its terms covers "an aircraft in flight in air commerce," applies only to commercial airliners engaged in the carriage of goods and persons for hire.

STATUTES INVOLVED

18 U.S.C. 3731 provides in part as follows:

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decisions or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

18 U.S.C. 1201 provides in part as follows:

(a) Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

Public Law 87-197, enacted on September 5, 1961,

75 Stat. 466, amended Section 902 of the *Federal Aviation Act* of 1958 (49 U.S.C. 1472) in part by adding:

AIRCRAFT PIRACY

(i) (1) Whoever commits or attempts to commit aircraft piracy, as herein defined, shall be punished —

(A) by death if the verdict of the jury shall so recommend, or, in the case of a plea of guilty, or a plea of not guilty where the defendant has waived a trial by jury, if the court in its discretion shall so order; or

(B) by imprisonment for not less than twenty years, if the death penalty is not imposed.

(2) As used in this subsection, the term "aircraft piracy" means any seizure or exercise of control, by force or violence or threat of force or violence and with wrongful intent, of an aircraft in flight in air commerce.

STATEMENT

The appellees accept the appellant's statement as being substantially correct.

ARGUMENT

I

Whether the *Federal Kidnaping Act* (18 U.S.C. 1201) is applicable to situations wherein there is an unlawful transportation for a lawful purpose.

It is well established under *Gooch* v. *United States*, 297 U.S. 124 (1936) and the cases that follow it, that the addition of the words "or otherwise" to the amended *Federal Kidnaping Act*, 18 U.S.C. Section 1201, are not limited to acts which result in pecuniary benefit to the kidnaper. However, there have been cases where this court and other Federal Courts have spoken up against the proposition that the *Federal Kidnaping Act* was to be used for a wide variety of unattractive situations.

In *Chatwin* v. *United States*, 326 U.S. 455 (1945) a case involving celestial marriage of a Mormon and a fifteen year old girl without her parent's consent, this Court said at 464:

> "But the broadness of the statutory language does not permit us to tear the words out of their context, using the magic of lexigraphy to apply them to unattractive or immoral situations lacking the very essence of the crime of kidnaping. . . . No unusual or notorious situation relating to the inability of state authorities to capture and punish participants in such activities evidenced itself at the time this Act was created; no authoritative spokesman indicated that the Act was to be used to assist the states in these matters,

however unlawful and obnoxious the character of these activities might otherwise be. Nor is there any indication that Congress desired or contemplated that the punishment of death or long imprisonment, as authorized by the Act, might be applied to those guilty of immoralities lacking the characteristics of true kidnapers. In short, the purpose of the Act was to outlaw interstate kidnapings rather than general transgressions of morality involving the crossing of state lines. And the broad language of the statute must be interpreted and applied with that plain fact in mind.

Were we to sanction a careless concept of the crime of kidnaping or were we to disregard the background and setting of the Act, the boundaries of potential liability would be lost in infinity. *A loose construction of the statutory language conceivably could lead to the punishment of anyone who induced another to leave his surroundings and do some innocent or illegal act for the benefit of the former, state lines subsequently being transversed. The absurdity of such a result, with its attendant likelihood of unfair punishment and blackmail, is sufficient by itself to foreclose that construction.*" (Emphasis added.)

In the *Gooch* case, supra, and the cases following *Gooch*, the conviction under the *Federal Kidnaping Act*, supra, involved an unlawful transportation for the accomplishment of an *unlawful purpose*. However, in the case at bar the indictment alleges an unlawful transportation for a *lawful purpose* — to wit: transportation from Florida to Cuba.

The cases cited by appellee in pages 8-12 of its brief involve an unlawful transportation for an unlawful purpose. The purpose of the transportation in *Gooch* v. *United States*, supra, was to prevent police officers from arresting their captors. In *United States* v. *McGrady*, 191 F. 2d 829 (1951), the purpose of the transportation was to aid an escape from prison. In *Hayes* v. *United States*, 296 F. 2d 657 (1961), certiorari denied 369 U.S. 867 (1962), it was for the purpose of fleeing from the police, as was the case in *Hess* v. *United States*, 254 F. 2d 578 (1958). In *Sanford* v. *United States*, 169 F. 2d 71 (1948), the transportation was for the unlawful purpose of robbing the victim; *Langston* v. *United States*, 153 F. 2d 840 (1946), purpose was for robbing the victim and preventing him from reporting an automobile theft. Although in *Wheatley* v. *United States*, 159 F. 2d 599 (1946), and *Bearden* v. *United States*, 304 F. 2d 532 (1962), certiorari granted, and judgment vacated on another ground, 372 U.S. 252 (1963), remanded in the light of *Elchek* v. *United States*, 370 U.S. 722 (1962), involved kidnaping for purposes which are not specifically illegal; both of the cases have been reversed and so only serve as dictum and not as law required to be followed.

The appellee's contend that this Court should recognize the difference and not extend the scope of the *Federal Kidnaping Act* to cover an unlawful transportation for a lawful purpose. It is respectfully submitted that the Act and severe penalties required thereunder, should not be applied to the indictment in the instant case.

II

Whether the statute punishing aircraft piracy (49 U.S.C. 1472(i)), which by its terms covers "an aircraft in flight in air commerce," applies only to commercial airliners engaged in the carriage of goods and persons for hire.

In an effort to determine whether "an aircraft" as used in Section 902 of the *Federal Aviation Act of 1958*, 49 U.S.C. 1472(i), as amended in 1961, was intended to apply to private, as well as commercial airlines, the appellees will cite parts of the *Congressional Record* dealing with this issue. That Congress was vitally interested in protecting individuals aboard commercial airliners is evident from the August 21st speech of Congressman Harris in which he says at 107 *Congressional Record* 16544, that the impact of piracy and "its seriousness is magnified manifold when committed on a speeding jet airliner." At 107 *Congressional Record* 16544 and 16545, Harris refers to five separate airline incidents that occurred exemplifying the need for some sort of air piracy legislation:

1. National Airlines plane forced to fly to Cuba (May 1);

2. Eastern Airlines jet plane forced to fly to Cuba (July 25);

3. Attempted hijacking of a Continental Airlines jet (August 3);

4. Pan American Jet forced to fly to Cuba (August 9);

5. Knife assault on an airline captain aboard a non-stop flight from Chicago to Los Angeles (July 8).

It should be noted by the Court that the above incidents which prompted Federal legislation involved only commercial airlines.

The need for additional legislation to protect commercial airlines was pointed to by Congressman Rostenkowski at 107 *Congressional Record* 16552 when he said:

> "Recent events that have occurred during scheduled commercial airline flights indicate that a vacuum exists in present statutes. . . . "

Congressmen Ryan, Edmondson, Libonati, and Curtin emphasized their concern for protecting passengers on commercial airliners at 107 *Congressional Record* 16551. Congressman Ryan refers to the hijacking of "a commercial flight." Congressman Edmondson says that he favors laws in this area and has "introduced a similar bill in the belief that such a law will operate to discourage the piracy of *American airliners*. . . . " Congressman Libonati makes it quite clear that he is concerned with "the welfare and safety of the crew and passengers who may number as many as 100 people in today's modern planes."

The government's brief (p. 14) contends that Section 902(i) "on its face . . . applies without reservation to *any* aircraft" (emphasis theirs), however, this does not aircraft" as the government would have the Court believe. in flight in air commerce" (emphasis ours) and not "*any* aircraft" as the government would have the Court beliefe. If legislative intent was to cover "*any* aircraft" why were

not the words "*any* aircraft in flight in air commerce" used? It is clear that "on its face" the statute does not apply to both private and commercial airlines. If "on its face" the technical words of art "aircraft in flight in air commerce" applied to anything, it would appear they should apply only to commercial airliners that deal in services to the general public in the "commerce" sense.. Further in its brief, (p. 14) the government says, "Moreover, it is evident that when Congress wished to frame a provision applicable only to air carriers, it knew how to do so." The appellees agree, and contend that Congress would have framed the statute so it would be *expressly* applicable to both private and commercial airliners, if it had wished to do so.

It is clear that the lower court felt that the *language* of the statute was limited to commercial airliners and was not intended to cover acts of piracy on private aircrafts. The 5th amendment of the *United States Constitution* guarantees to criminal defendants that they be informed of the exact nature of the offense they are charged with in order that they may prepare a proper and adequate defense. It is the appellees contention, that if this court finds the statute in question was intended to cover private as well as commercial airliners, that the statutory language is vague and ambiguous and violates the *United States Constitution.*

CONCLUSION

For the reasons stated, appellees respectfully submit that this Court should affirm the judgment below, or in the alternative, dismiss this cause for lack of jurisdiction.

Respectfully submitted,

R. E. KUNKEL
ROBERT L. SHEVIN
ALVIN GOODMAN
SYLVAN N. HOLTZMAN
HARRY M. ROSEN

August 22, 1963

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appellees' Brief has, pursuant to Rule 33(1) of the Revised Rules of the Supreme Court of the United States, been served by mail upon ARCHIBALD COX, Solicitor General, Department of Justice, Washington 25, D. C., by air mail, and hand delivered upon WM. A. MEADOWS, JR., United States Attorney of the Southern District of Florida, Federal Building, Miami, Florida, this 22 day of August, 1963.

R. E. KUNKEL

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 64

UNITED STATES OF AMERICA

v.

DAVID THOMAS HEALY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

REPLY BRIEF FOR THE UNITED STATES

1. At the jurisdictional stage, respondent moved to dismiss the government's appeal on the ground that it was untimely. Although this Court noted probable jurisdiction without requesting argument on the jurisdictional issue, respondent again argues the issue of timeliness (Br. 1–6). In our view, there is no merit to the contention. The district court dismissed both counts of the indictment on September 17, 1962, and a petition for rehearing was filed on October 17, 1962. The order denying this petition was filed on November 8, 1962. The notice of appeal, filed on December 5, 1962, within 30 days after the denial of the petition for rehearing, was timely. See Rule 37(a)(2), F.R. Crim. P.; Supreme Court Rule 11(2).

706-255—63

It has long been settled in the federal courts that when a district court entertains a petition for rehearing, the judgment of the court as originally entered does not become final until the denial of rehearing, and the time to appeal runs from the date of denial of rehearing. *Wayne Gas Co.* v. *Owens Co.*, 300 U.S. 131, 137–138; *Bowman* v. *Loperena*, 311 U.S. 262, 264–266; *Morse* v. *United States*, 270 U.S. 151, 153, 154; *United States* v. *Ellicott*, 223 U.S. 524, 539; *Saginaw Broadcasting Co.* v. *Federal Communications Commission*, 96 F. 2d 554, 558 (C.A.D.C.), certiorari denied, 305 U.S. 613; *Suggs* v. *Mutual Ben. Health & Accident Ass'n.*, 115 F. 2d 80, 82 (C.A. 10); *Babler* v. *United States*, 137 F. 2d 98, 99 (C.A. 8). There is no reason whatever to suggest that this rule, and the reasoning upon which it is based, do not apply to criminal, as well as to civil, cases. Thus, in *Craig* v. *United States*, 298 U.S. 637, a criminal case, the defendant had applied for certiorari while he had a petition for rehearing pending in the court of appeals. This Court denied the writ "upon the ground that [the petition] is premature, without prejudice to a renewal of the application within thirty days after action by the Circuit Court of Appeals on the petition for rehearing." See, to similar effect, *Forman* v. *United States*, 361 U.S. 416, 426.[1]

[1] The rule does not apply, to be sure, when the petition for rehearing is filed after the time for appeal has expired, merely for the purpose of extending the time for appeal, *Wayne Gas Co.* v. *Owens Co.*, 300 U.S. 131, 136. That exception, however, has no application here. The government's petition for rehearing was filed within the time for appeal (within 30 days of the

2. Petitioner contends that since the indictment alleges an unlawful transportation for a lawful purpose, *i.e.*, transportation from Florida to Cuba, the Federal Kidnaping Act is inapplicable (Br. 9–11). But the holding of a person against his will—and, no less, the transportation of one held captive—is a wrong in itself, whatever the purpose of the transportation. Certainly the captive in this case had no intention to go to Cuba. Under *Gooch* v. *United States*, 297 U.S. 124, 128, if the person transported in interstate commerce has been held for any purpose which involves a benefit to the captor, he is a person "held for ransom or reward or otherwise." That is this case. Petitioner recognizes that *Wheatley* v. *United States*, 159 F. 2d 599 (C.A. 4), and *Bearden* v. *United States*, 304 F. 2d 532 (C.A. 5), involved kidnaping for purposes which were not specifically illegal, but argues that those cases are not controlling because the convictions were reversed.[2] The reversals, however, were upon other grounds—grounds which did not touch the ruling that transportation of a person held against his will for a purpose not specifically illegal is within the purview of the Federal Kidnaping Act.

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original judgment) for the purpose of calling to the attention of the district court matters which had been overlooked.

In *United States* v. *Quon*, 241 F. 2d 161 (C.A. 2), certiorari denied, 354 U.S. 913, an untimely appeal from the denial of a motion for modification of sentence had been discontinued and a motion, in effect for reargument, had been made in the district court. It was held that in such circumstances, the denial of the motion for reargument did not extend the time for appealing from the original order.

[2] After this Court remanded the *Bearden* case for reargument, 372 U.S. 252, the court of appeals reversed for error in the instructions.

3. The fact that various Congressmen spoke about acts of piracy being committed against commercial airliners (see respondent's brief, 12–13) does not show that the Act, which unquestionably does apply to the piracy of commercial airliners, does not also cover private aircraft. The government's argument on this point is set out in our main brief at pp. 12–17.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

SEPTEMBER 1963.

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